# Public Bank Bhd v Ong Wen Wah & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D4–22–1760 OF 1989
ABDUL WAHAB PATAIL J
11 APRIL 2005

*Contract — Guarantee — Guarantee to bank given by directors of company — Whether there was a valid letter of demand served — Whether liability limited to sum outstanding to plaintiff on date of winding up order against borrower — Whether from various facilities given, some to be secured by charge and some by guarantee — Contracts Act 1950 s 81*

Yuyi Supermarket Sdn Bhd (the borrower) was at all material times a company incorporated in Malaysia and a customer of the plaintiff. The plaintiff granted to the borrower credit and a number of banking facilities on the terms and conditions set out in a letter of offer dated 6 July 1983 accepted by the borrower. One of the terms and conditions of the granting of the banking facilities was that the directors of the borrower ie, the defendants are to execute guarantees to secure the said banking facilities. They executed two guarantees of RM1,600,000 and RM2,400,000 dated 20 July 1983 and a shipping guarantee of RM400,000. The overdraft, letter of credit and trust receipt facilities were also secured by first legal charges (the charge) under the National Land Code 1965 granted by the borrower in favour of the plaintiff over the lands (the lands). Trial commenced on 22 March 2005 against the fourth defendant. Both parties agreed on the following issues for submissions: (i) whether a valid letter of demand was served on the fourth defendant; (ii) whether liability is limited to the sum outstanding to the plaintiff on the date of winding up order on 10 August 1987 against the borrower; and (iii) whether only the letter of guarantee of RM1.6m is in force because the RM2.4m guarantee was to be cancelled as there is a charge of RM2.24m charge created over the lands.

**Held**, allowing plaintiff's claim:

(1) An affidavit of posting affirmed by Abd Aziz confirmed that the deponent had on 11 July 1989 posted five letters dated 11 July 1989 referred to as exh 'NFY-3' in the affidavit of Ngeow Foo Yoke which is the letter of demand dated 11 July 1989. By virtue of s 33 of the Evidence Act 1950, the affidavit of posting affirmed by Abd Aziz bin Abd Rahman is relevant to prove the truth of the facts stated in it because it is 'evidence given by a witness' earlier in this 'same judicial proceeding'; the witness (Abd Aziz bin Abd Rahman) 'cannot be found' and the requirements in the proviso to s 33 have all been satisfied (see para 6).

(2) It is clear from a reading of cl 3 of the letter of guarantee which provides that 'the full amount hereby guaranteed shall be payable by us until you shall have

received from all sources one hundred cents in the dollar on the ultimate balance outstanding against the customer'. To argue that the fourth defendant's liability is limited to the sum outstanding to the plaintiff on the date of winding up order would mean that cl 1 and 3 are not given effect to and at the same time, disregarding the principle of law laid down in s 81 of the Contracts Act 1950. The court finds that the plaintiff is entitled to seek interest for the period after the borrower company had been wound up (see para 14).

(3) There is no evidence adduced that one facility was to be secured by a charge and the other by a guarantee. The second charge is of RM2.24m while the particular facility is RM2.4m. Given the various facilities, the court finds no support from the evidence to support the argument that the second guarantee was not to be in effect (see para 14).

**[Bahasa Malaysia summary**

Yuyi Supermarket Sdn Bhd (peminjam) adalah pada setiap masa yang material sebuah syarikat yang ditubuhkan di Malaysia dan seorang pelanggan plaintif. Plaintif memberikan peminjam kredit dan beberapa kemudahan-kemudahan perbankkan atas terma-terma dan syarat-syarat yang dinyatakan dalam surat tawaran yang bertarikh 6 Julai 1983 yang diterima oleh peminjam. Salah satu terma dan syarat dalam pemberian kemudahan-kemudahan perbankan tersebut adalah bahawa pengarah-pengarah peminjam iaitu defendan-defendan hendaklah melaksanakan jaminan-jaminan untuk melindungi kemudahan-kemudahan perbankan tersebut. Mereka telah melaksanakan dua jaminan untuk RM1,600,000 dan RM2,400,000 bertarikh 20 Julai 1983 dan satu jaminan perkapalan berjumlah RM400,000. Kemudahan-kemudahan overdraf, surat kredit dan resit amanah juga dijamin melalui cagaran pertama ke atas hartanah ('cagaran') di bawah Kanun Tanah Negara 1965 yang diberikan oleh peminjam kepada plaintif atas beberapa hartanah ('hartanah'). Perbicaraan dimulakan pada 22 Mac 2005 terhadap defendan keempat. Kedua-dua pihak bersetuju isu-isu berikut untuk hujahan: (i) sama ada terdapat surat tuntutan yang sah yang disampaikan kepada defendan keempat; ii) sama ada liabiliti adalah terhad kepada jumlah yang terhutang kepada plaintif pada tarikh perintah penggulungan 10 Ogos 1987 terhadap peminjam; dan (iii) sama ada hanya surat jaminan RM1.6j yang masih berkuatkuasa oleh kerana jaminan RM2.4j telah dibatalkan disebabkan terdapat cagaran RM2.24j ke atas hartanah tersebut.

**Diputuskan**, membenarkan permohonan plaintif:

(1) Satu afidavit pengeposan yang diikrarkan oleh Abd Aziz telah mengesahkan bahawa deponen tersebut telah pada 11 Julai 1989 mengeposkan lima surat bertarikh 11 Julai 1989 yang dirujuk sebagai ekshibit 'NFY-3' di dalam afidavit Ngeow Foo Yoke yang merupakan surat tuntutan bertarikh 11 Julai 1989. Menurut s 33 Akta Keterangan 1950, afidavit pengeposan yang diikrarkan oleh Abd Aziz bin Abd Rahman adalah relevan untuk membuktikan kebenaran fakta-fakta yang dinyatakan di dalamnya oleh kerana ia adalah 'keterangan yang diberikan oleh seorang saksi' sebelum ini dalam 'prosiding kehakiman

yang sama', saksi (Abd Aziz bin Abd Rahman) 'tidak dapat dijumpai' dan keperluan-keperluan di dalam peruntukan s 33 telah dipenuhi (lihat perenggan 6).

(2) Adalah jelas dari bacaan kl 3 surat jaminan tersebut yang menyatakan bahawa 'the full amount hereby guaranteed shall be payable by us until you shall have received from all sources one hundred cents in the dollar on the ultimate balance outstanding against the customer'. Untuk menghujahkan bahawa liabiliti defendan keempat adalah terhad kepada jumlah yang perlu dibayar kepada plaintif pada tarikh perintah penggulungan akan bermakna kl 1 dan 3 tidak diberikan kesan dan pada masa yang sama, tidak mengendahkan prinsip undang-undang yang dinyatakan di s 81 Akta Kontrak 1950. Mahkamah memutuskan bahawa plaintif adalah berhak menuntut faedah untuk jangkamasa selepas peminjam syarikat digulungkan (lihat perenggan 14).

(3) Tiada bukti dikemukakan bahawa satu kemudahan adalah untuk dijamin melalui gadaian dan satu lagi melalui jaminan. Gadaian kedua adalah sebanyak RM2.24j sementara kemudahan tersebut adalah RM2.4j. Dengan beberapa kemudahan-kemudahan tersebut, mahkamah memutuskan bahawa tiada bukti untuk menyokong hujahan bahawa jaminan kedua tidak dapat dikuatkuasakan (lihat perenggan 14).]

**Notes**

For cases on guarantee genarally, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3345–3588.

For cases on letters of demand, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3420–3438.

**Cases referred to**

*Mohamad Kunju v PP* [1966] 1 MLJ 271 (refd)

*United Malayan Banking Corp Bhd v Lim Meng Hua & Ors* [1990] 1 MLJ 54 (refd)

**Legislation referred to**

Contracts Act 1950 s 81
Evidence Act 1950 s 33
National Land Code 1965

*Mohd Aidil bin Rusli (Dhyana Shila & Lua Ai Siew with him) (Soo Thien Ming & Nashrah) for the plaintiff.*

*AM Pillai (Sharon Balasingam with him) (Arulampalam & Co) for the defendants.*

**Abdul Wahab Patail J:**

**[1]** Yuyi Supermarket Sdn Bhd (formerly Yuyi Shangdian Sdn Bhd; 'the borrower') was at all material times a company incorporated in Malaysia and a customer of the plaintiff. The directors of the borrower were: Ong Wen Wah (the first defendant); Koh Pak Ngee @ Koh Chik Chiow (the second defendant); Teong Ah Oi @ Lim Ah Oi (the third defendant); Chow Sing Yau (the fourth defendant) and Yong Teck Fah @ Yong Peng Fah (the fifth defendant). The plaintiff granted to the borrower credit

and other banking facilities, namely an overdraft facility of RM1,600,000; letter of guarantee facility of RM200,000; letter of credit facility of RM1,200,000; trust receipt facility of RM1,000,000; and shipping guarantee facility of RM400,000 on the terms and conditions set out in a letter of offer dated 6 July 1983 accepted by the borrower.

**[2]** One of the terms and conditions of the granting of the banking facilities was that the directors of the borrower ie, the defendants are to execute guarantees to secure the said banking facilities. They executed two guarantees of RM1,600,000 and RM2,400,000 dated 20 July 1983 and a shipping guarantee of RM400,000. The overdraft, letter of credit and trust receipt facilities were also secured by first legal charges ('the charge') under the National Land Code 1965 granted by the borrower in favour of the plaintiff over the lands ('the lands') held by the borrower under HS(D) 17523 to 17528 No Lot PT 63 Sec 62 Bandar Kuala Lumpur.

**[3]** Trial commenced on 22 March 2005 against the fourth defendant with Lua Ai Siew and Mohd Aidil Rusli for the plaintiff and AM Pillai and Sharon Balasingam for the fourth defendant. Both parties agreed on the following issues for submissions:

(a) whether a valid letter of demand was served on the fourth defendant;

(b) sum despite the fact that the borrower company had been wound up on 10 August 1987;

(c) why were there two letters of guarantee executed in respect of the facility granted.

**[4]** Clause 8 of both letters of guarantee provide:

> (8) As to each of us any notice may be served on each of us or on the legal personal representatives of each of us either personally or by sending the same through the post in an envelope addressed to the abovementioned address or the last known place of address of the person to be served, and a notice so sent shall be deemed to be served on the day following that on which it is posted.

**[5]** An affidavit of posting affirmed by Abd Aziz confirmed that the deponent had on 11 July 1989 posted five letters dated 11 July 1989 referred to as exh 'NFY-3' in the affidavit of Ngeow Foo Yoke which is the letter of demand dated 11 July 1989. The Federal Court in *Mohamad Kunju v Public Prosecutor* [1966]1 MLJ 271 approved the judgment of Raja Azlan Shah J (as His Majesty then was) where he said:

> PW1 was examined by Dr Subodh Kumar, and so was the accused who had since been arrested. Dr Subodh Kumar, who gave evidence at the preliminary enquiry, was cross-examined at great length by defense counsel. He was not available at the present trial and the prosecution applied to tender his deposition under the provisions of s 33 of the Evidence Ordinance. The principle under which those provisions can be applied has been stated by various authorities. Suffice it if I reproduce a passage in the judgment of the Court of Appeal in *Kee Siak Kooi v Regina*:
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> > It is established law that before any evidence can be admitted under s 33 of the Evidence Ordinance 1950, proof of the circumstance contemplated in that section must be strictly given.

**[6]** PW1 said that he had tried to look for the said Abd Aziz bin Abd Rahman at his last known address, as evidenced by the recent cabutan daftar alamat dated 27 January 2005 but could not find him. By virtue of s 33 of the Evidence Act 1950, the affidavit of posting affirmed by Abd Aziz bin Abd Rahman is relevant to prove the truth of the facts stated in it because it is 'evidence given by a witness' earlier in this 'same judicial proceeding'; the witness (Abd Aziz bin Abd Rahman) 'cannot be found'; and the requirements in the proviso to s 33 have all been satisfied.

**[7]** The evidence of PW2 confirms that there was a letter of demand. PW2 in his witness statement and in answering questions 3 to 5 confirmed that he issued the said letter of demand and that believed it was sent. The affidavit of posting affirmed by Abd Aziz bin Abd Rahman proves that the letter of demand has been sent through the post; and DW1 himself confirmed that the address on the letter of demand is correct.

**[8]** The fourth defendant never denied receiving the letter of demand. The fourth defendant himself (DW1), in his witness statement said that the letter of demand dated 11 July 1989 was addressed to him care of his former firm. DW1 later, in cross-examination, confirmed that the address was correct; and again later, during re-examination, confirmed that he was still with the firm of Chye Chow Chung & Co. at the material time. In the circumstances, I hold that the discrepancy between Abd Aziz bin Abd Rahman was in the employment of the plaintiffs previous solicitors or Corpus Eight Sdn Bhd to be immaterial. It would be unsafe to make much of it since PW2 was not cross-examined. Similarly, in respect of the fact the affidavit of posting was filed before the hearing of the summary judgment application before the judge in chambers but after the hearing before the registrar. Not much can be made if it in complaint at this point in submissions when no evidence was placed before the court as to what actually transpired then by examination of the solicitors who had appeared then. The court, therefore, finds that the letter of demand dated 11 July 1989 was served on the fourth defendant.

**[9]** It is the contention of the fourth defendant that even if he is liable under the letter of guarantee, he is not liable to the plaintiff for interest accruing after the borrower company has been wound up on 10 August 1987. The letter of guarantee provides:

> Clause 1 — We will pay to you on demand all money which now is or may during the operation of this agreement be owing to you from the customer or remain unpaid on the general balance of the customer's account with you including interest at such rate as may be from time to time agreed between the customer and you or allowed by you... although the relation of banker and customer may have ceased and all costs charges and expenses which you may incur in enforcing or seeking to enforce any security for or obtaining or seeking to obtain payment of all or any part of the money hereby guaranteed.

**[10]** Further it was provided:

> Clause 3 — Should the customer become bankrupt or insolvent or being an incorporated company shall be wound up, you may prove in the bankruptcy insolvency or winding up of the customer for the whole amount outstanding against the customer on such general

balance and no money or dividend so received by you shall be treated as received in respect of this guarantee or otherwise in relation to us, but the full amount hereby guaranteed shall be payable by us until you shall have received from all sources one hundred cents in the dollar on the ultimate balance outstanding against the customer. After you have received such ultimate balance in full any claim on our part to any excess or any securities remaining in your hands shall be matter of adjustment between you us and any other person or persons laying claim thereto.

**[11]** It is clear from a reading of cl 3 which provides that 'the full amount hereby guaranteed shall be payable by us until you shall have received from all sources one hundred cents in the dollar on the ultimate balance outstanding against the customer'. To argue that the fourth defendant's liability is limited to the sum outstanding to the plaintiff on the date of winding up order would mean that cll 1 and 3 are not given effect to/and at the same time, disregarding the principle of law laid down in s 81 of the Contracts Act 1950. In *United Malayan Banking Corp Bhd v Lim Meng Hua & Ors* [1990] 1 MLJ 54 the learned judge quoted with approval this passage from the textbook entitled *Legal Problems of Credit and Security* by Professor RM Goode.

Impact of Debtors Bankruptcy on surety's liability

(1) In general, liability is unaffected

The bankruptcy of the principal debtor does not as a general rule affect the creditor's rights against the surety. The creditor may lodge a proof in the bankruptcy for the full outstanding balance of the debt and simultaneously sue the surety to judgment, and enforce such judgment to the extent to which the creditor has not received a dividend from the estate. Even the discharge of the debtor does not affect the surety's liability. This is expressly provided by s 18(4) of the Bankruptcy Act 1914.

(2) Interest accruing after receiving order

Some care needs to be taken in regard to the interest clause in the guarantee. If interest is expressed to be payable 'so long as any amount is due from the debtor', the right to charge interest to the surety apparently terminates with the debtor's bankruptcy, at which point the debt ceases to be legally recoverable from him. This result can be avoided by stipulating that interest is to run against the surety 'until payment' of the amount due from the principal debtor.

**[12]** See also *The Law of Guarantee in Singapore and Malaysia* (2nd Ed) by Low Kee Yang on p 144.

**[13]** The distinction arises from the fact that upon his bankruptcy, no further amount was owing by the borrower except the amount as on that dote. But if the wording is that it should run against the surety, then interest may accrue again against the surety. The following in cl 1 of the letters of guarantee that: 'We will pay to you on demand all money which now is or may during the operation of this agreement be owing to you from the customer or remain unpaid on the general balance of the customer's account with you … including interest … although the relation of banker

and customer may have ceased...' in my view overcomes the limitation as the words are clearly intended to pertain to a liability by the surety and no longer that of the borrower. The use of the term 'ultimate balance' rather than 'balance' in cl 3 supports the above interpretation.

**[14]** The court finds that the plaintiff is entitled to seek interest for the period after the borrower company had been wound up. The fourth defendant admitted signing both letters of guarantee of RM1.6m and RM2.4m respectively but argued that only the letter of guarantee of RM1.6m is in force because the RM2.4m guarantee was to be cancelled as there is a charge of RM2.24m charge created over the lands. There is no evidence adduced that one facility was to be secured by a charge and the other by a guarantee. The testimony of DW1 in cross-examination offers no support for this argument. Indeed, the opposite. Further, the argument already standing tottering on one wooden leg, falls when it is realised that the second charge is of RM2.24m while the particular facility is RM2.4m. Given the various facilities, the court finds no support from the evidence to support the argument that the second guarantee was not to be in effect.

**[15]** In the event, judgment was entered for the plaintiff against the defendant as prayed.

*Plaintiff's claim allowed.*

Reported by Sally Kee